SUBJECT INDEX

PAGE

Summary statement of the matter involved..... 2

Replying to the petitioners' "Reasons relied upon for the allowance of the writ"..... 4

TABLE OF AUTHORITIES CITED

CASE PAGE

Rogers v. Pacific-Atlantic S.S. Company, 170 F. 2d 30..... 4

STATUTE

United States Code, Title 46, Sec. 701..... 4

TEXTBOOK

American Bar Journal, Vol. 20, No. 6, p. 341..... 5

IN THE

Supreme Court of the United States

October Term, 1948.
No. 605.

PETE FIAMENGO and NICK MARINKOVICH,

Petitioners,

vs.

THE AMERICAN FISHING VESSEL "SAN FRANCISCO" and ANDREW ZAMBERLIN,

Respondents.

Respondents' Reply to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The respondents, the American fishing vessel "SAN FRANCISCO" and Andrew Zamberlin, reply to certain portions of the "Petition" filed on behalf of the petitioners, Pete Fiamengo and Nick Marinkovich, in the following particulars, and in so doing will follow the outline of the "Petition":

Summary Statement of the Matter Involved.

In January, 1947, petitioners were employed by Andrew Zamberlin, then Master, and at all times managing owner and fish boss of the D/S "SAN FRANCISCO."

Sometime around the middle of March, 1947, while at Navidad Bay, Mexico, waiting for the weather to clear [Vol. II, R., p. 46; Vol. I., R., p. 29, Finding VII], a party of the fishermen from the D/S "SAN FRANCISCO" and another vessel, the "ST. JAMES," also anchored in Navidad Bay, went ashore early in the evening. The petitioners, Nick Zamberlin, the Master of the D/S "SAN FRANCISCO," and Andrew Zamberlin, the fish boss and managing owner of the D/S "SAN FRANCISCO" were among the party.

Prior to departure, Andrew Zamberlin and the Master of the "ST. JAMES" had a discussion in the presence of the petitioners as to when the party should return to the vessels [Vol. II, R., pp. 73, 142, 143]. The substance of the discussion was that they should remain two or three hours and all return together.

When the party reached shore, they entered a small open air or partially enclosed Cantina where they partook of refreshments. At about 11:00 P. M. the managing owner and fish boss, admittedly the person who gave all orders aboard the D/S "SAN FRANCISCO" [Vol. II, R., pp. 21, 85, 86, 123, 124, 140], and the Master of the "ST. JAMES," stated in a loud voice, "Let's go!" [Vol. II, R., pp. 75, 144, 145, 174]. The petitioners could not have failed to hear the command, and the Honorable District Court found that they did hear it [Vol. I, R., p. 31, Finding IX; Vol. II, R., pp. 123, 144, 145, 174]. The petitioners did not receive

permission from anyone to stay ashore [Vol. II, R., pp. 132, 133, 158; Vol. I, R., p. 31, Finding X].

The petitioners remained ashore without leave until about 5:00 A. M. the following morning.

The vessel proceeded to San Pedro, discharged its cargo and went into drydock for repairs. After the vessel was again ready to sail, the petitioners came back aboard and they were informed by the fish boss and managing owner with the consent of the Master, that they were discharged. No protest was made by the petitioners [Vol. II, R., pp. 66, 95] and although there is some question as to exactly what was said at the time of discharge there is no question that the petitioners and all other parties concerned were aware of the reason for discharge, to-wit, the absent without leave at Navidad Bay, for the very next day, April 23, 1947, the petitioners went to their Union and had the statement executed which is in evidence as Libelants' Exhibit "1," and which statement in its opening paragraph indicates their knowledge [Vol. I, R., p. 18].

Attention is called to the fact that the D/S "San Francisco" and the Master and owners of the vessel were, with respect to the petitioners, bound by a Union Agreement, Libelants' Exhibit "2" [Vol. I, R., p. 19, *et seq.*], and under said Agreement, to which both petitioners and respondent were bound, there is an express provision that there shall be no deductions, fines, or other punishment visited on the members of the crew, of which petitioners were members, save as provided in the Agreement [Libelants' Exhibit "2," Clause IV; Vol. I, R., p. 20]; such prohibition is expressed again in Clause VII of the Union Agreement. Upon examination of the Union Agreement,

it will be found that there is no provision anywhere therein which allows deductions, fines or *other punishment*, short of discharge, for disobedience while at sea or in a foreign port.

Replying to the Petitioners' "Reasons Relied Upon for the Allowance of the Writ."

The case of *Rogers v. Pacific-Atlantic S.S. Company*, 170 F. 2d 30, cited by petitioners as being in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in the instant case, is a case where a seaman left the ship and sued for wages to the end of the voyage, claiming he was justified in leaving the ship because of the conduct of the Master, and is in no respect a case involving discharge, and even by way of dicta is not in conflict with the Court of Appeals' decision in the instant case.

The other cases cited on page 5 by petitioners are in no way in conflict with the Court of Appeals for the Ninth Circuit's decision in the instant case. They merely apply the same rule of law to a different set of facts.

The petitioners rely heavily on Title 46, U. S. C. 701, but admit the inherent right of the Master to discharge a seaman, qualified by the rule laid down by the Courts that a discharge should not be for a single act of disobedience, if *trivial* or *unprovoked*, unless the act is of an *aggravated* nature. The cases cited by the Courts of Appeals for the Ninth Circuit in support of its decision in the instant case [Vol. III, R., p. 3] follow the same rule of law. Those cases also clearly set forth the rule of law that absence without leave is justification for discharge. The non-applicability of Section 701 and the aggravation of the single act of disobedience in the instant case be-

comes clearly apparent when it is noted that the vessel was a fishing vessel ready to sail with the weather, and that the Master and owners had no other way of punishing the petitioners for their disobedience [See Libelants' Exhibit "2," Vol. I, R., p. 20].

It is submitted that the questions here presented for review, in the words of former Chief Justice Hughes, ". . . turn upon the facts of the particular case, and there is no controversy of importance with respect to legal principals . . . and there is an utter absence of any good reason for asking our review." (American Bar Journal, Vol. XX, No. 6, p. 341.)

Respectfully submitted,

ARCH E. EKDALE and
GORDON P. SHALLENBERGER,
By ARCH E. EKDALE,
Attorneys for Respondents.